STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 24, 2013
v	No. 306763 Wayne Circuit Court
RAMON BARBER, Defendant-Appellant.	LC No. 11-005447-FH

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). Defendant was sentenced to two years' probation with the first 11 months in jail. We affirm.

Defendant argues on appeal that there was insufficient evidence adduced at trial that he possessed the requisite intent for possession with intent to deliver, and that he was deprived of the effective assistance of counsel when trial counsel failed to call two res gestae witnesses. For the reasons stated below, we disagree.

I. SUFFICIENCY OF THE EVIDENCE

We review a claim of insufficient evidence de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). However, we "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992)). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

The elements required to prove possession with intent to deliver are:

> (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with intent to deliver. [MCL 333.7401 (2)(a)(iv); *Wolfe*, 440 Mich at 517.]

Defendant only argues that the prosecution failed to prove that he had the intent to deliver the cocaine. "An intent to deliver may be proven by circumstantial evidence and may be inferred from the amount of controlled substance possessed." *Williams*, 268 Mich App at 422. In addition, the packaging of the substance can suggest an intent to deliver. *Id.* Intent, by its nature, is difficult to prove, and therefore "minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 518; 583 NW2d 199 (1998).

Defendant argues that a lack of white powder residue, empty capsules, zip-lock baggies, and scales at the scene raises a reasonable doubt as to defendant's intent to deliver the cocaine. However, the record as a whole contains sufficient evidence of defendant's intent to deliver. First, the amount—50 vials of cocaine—is suggestive of a quantity intended for sale, rather than for personal use. See *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991) (possession of six crack rocks was indicative of an intent to deliver). Second, the packaging of individual vials each containing an amount of cocaine implies that the substance was packaged for delivery to others. *Wolfe*, 440 Mich at 524-525 ("[T]he recovered crack cocaine was packaged for sale in *individual* envelopes.") (Emphasis added.); *Williams*, 268 Mich App at 422-423 (marijuana stored in six small plastic bags suggests it was intended to be transferred to others). Myron Watkins, the police officer who saw defendant remove from his pocket a plastic bag filled with vials of cocaine, testified that, based on his experience in law enforcement, cocaine is sometimes packaged this way for sale. Third, defendant had $230 on his person, which can at least be considered corroborative evidence of drugs sales. See *Wolfe*, 440 Mich at 525 (the defendant's possession of $255 constituted supporting evidence of intent to deliver). Although it is not outside the realm of possibility that defendant possessed 50 vials of cocaine for personal use, drawing reasonable inferences from the combined circumstantial evidence, and viewing the evidence in a light most favorable to the prosecution, a rational jury could have found defendant had the intent to deliver cocaine. The prosecution need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

II. INEFFECTIVE ASSISTANCE OF COUNSEL

To preserve a claim of ineffective assistance of counsel, defendant generally must make a motion for a new trial or a *Ginther* hearing with the trial court. See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Failure to preserve the issue limits this Court's review to mistakes apparent on the record. *Rodriguez*, 251 Mich App at 38. Defendant failed to move for a new trial or a *Ginther* hearing, so our review is limited to mistakes apparent on the record.

Whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. The trial court's factual findings, if any, are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008).

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of

proving otherwise." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). "Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007); *People v Fike*, 228 Mich App 178, 183; 577 NW2d 903 (1998) ("[T]his Court will not substitute its judgment for that of counsel.")

"Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). In fact, "[t]he failure to call a witness only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A defense is substantial only if it would have affected the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant argues that his trial counsel rendered ineffective assistance because he did not call as witnesses at trial two individuals who were in the house when the police recovered the cocaine from defendant. In the absence of any evidence from a *Ginther* hearing—for which defendant failed to move—the record is the only appropriate evidence to consider. *Rodriguez*, 251 Mich App at 38. Nothing in the record indicates that these witnesses' testimony would have been favorable to defendant. Trial counsel may have decided not to call these witnesses for any number of strategic reasons, including her own credibility assessment, or merely because their testimony would have been unfavorable to defendant's case; there is no basis to conclude that defendant was deprived of any defense, let alone a substantial one. Furthermore, the record establishes that one of the witnesses, Kevin Brown, was not even a res gestae witness because Brown was in a different room at the time Watkins saw defendant pulling the bag of cocaine from his pocket.

Although defendant argues cursorily that there is "no trial strategy that can justify the failure to produce the two res gestae witness at trial" there are in fact numerous strategic reasons why counsel may choose not to call a particular witness. In addition to those noted, for example, counsel is not required to present perjurious testimony. *People v LaVearn*, 448 Mich 207, 217-218; 528 NW2d 721 (1995), cert den 532 US 962; 121 S Ct 1496; 149 L Ed 2d 382 (2001). In any event, we conclude that defendant, by failing to indicate the substance of the witnesses' potential testimony, has not carried his burden of either rebutting the presumption of trial strategy or demonstrating prejudice. See *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996). Therefore, he was not denied effective assistance of counsel.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Mark T. Boonstra